OAH Docket 0320-30105

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Martin, Chair, Minnesota Democratic-Farmer-Labor Party,

Complainant,

vs.

David Gaither and Gaither for Senate Committee,

Respondent.

**DISMISSAL ORDER**

On November 2, 2012, this matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Barbara L. Neilson. The probable cause hearing was conducted by telephone conference call. The record closed on November 5, 2012, with the parties' filing of supplemental exhibits.

David J. Zoll, Attorney at Law, Lockridge Grindal Nauen, PLLP, represented Complainant Ken Martin, Chair of the Minnesota Democratic-Farmer-Labor Party. R. Reid LeBeau II, Attorney at Law, Jacobson Buffalo, P.C., represented Respondents David Gaither and the Gaither for Senate Committee.

Based on the record and all of the proceedings in this matter, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minnesota Statutes § 211B.06 as alleged in the Complaint.

**ORDER**

**IT IS ORDERED**: That there is not probable cause to believe that Respondents violated Minnesota Statutes § 211B.06 as alleged in the Complaint, and this matter is accordingly DISMISSED.

Dated: November 15, 2012

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Digitally recorded; no transcript prepared

## NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

Respondent David Gaither is a former member of the Minnesota Senate. He was elected in 2002 and served until 2005. In 2012, Senator Gaither ran for election to the Minnesota Senate for Senate District 44. The Complaint alleges that during his 2012 campaign, Senator Gaither falsely claimed in a television advertisement that he is the only candidate in the race for Senate District 44 who has never voted to cut funding for K-12 education in Minnesota.[1] The recording of the advertisement referenced in the Complaint confirms that Senator Gaither stated, "I never ever voted to cut funding for K-12 education and, in this race, I am the only person who can say that."[2]

The Complainant argues that this claim by Senator Gaither is false because Senator Gaither voted in favor of House File 51 during the 2003 Special Session of the Legislature.[3] The Complainant contends that House File 51 did, in fact, cut K-12 education funding,[4] and emphasizes language in a nonpartisan Fiscal Review Report prepared by the Office of Senate Counsel and Research which indicated that House File 51 cut public education by $184.9 million.[5] Because Senator Gaither voted for passage of House File 51, the Complainant argues that his statement in the television ad that he has never voted to cut K-12

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[1] Complaint at 3.
[2] *See* http://www.youtube.com/watch?v+NCBKP6dbW38&feature=youtu.be.
[3] Complaint at 3 and Ex. A; *see* Laws of Minnesota 2003, 1st Spec. Sess., Chapter 9.
[4] Complaint at 3-4.
[5] Complaint at 3-4, *citing* an Office of Senate Counsel and Research report entitled "A Fiscal Review of the 2003 Legislative Session" at 4, 13. The Report is available on line at http://www.senate.leg.state.mn.us/departments/scr/freview/2003/fiscal_review.pdf.

funding is false. The Complainant further maintains that Senator Gaither and his campaign committee, the Gaither for Senate Committee, knew the statement was false or communicated it with reckless disregard as to whether it was false.[6]

During the probable cause hearing, the Respondents argued that this matter is simply an exercise in semantics involving the meaning of the word "cut," and urged that the Complaint be dismissed. The Respondents asserted that House File 51 did not result in an actual cut in K-12 spending when compared to the spending during the prior biennium, and it was reasonable for Mr. Gaither to make the statement he made. Senator Gaither and Ed Cook, a researcher for the Minnesota Senate Republican Caucus, were called to testify in support of the Respondents' position. Both testified that House File 51 resulted in an increase in the total and per-pupil spending for K-12 education over the prior biennium. Mr. Cook indicated that the portion of the Fiscal Review Report upon which the Complainant relied was comparing the spending authorized in House File 51 to the figures in the projected budget forecast, which includes built-in growth factors, rather than to actual spending. Mr. Cook also pointed out that the same report shows that actual appropriations for "E-12" education went from approximately $10 billion in the 2001-03 biennium to $11.8 billion in the 2003-05 biennium.[7]

The record remained open following the probable cause hearing for the submission of additional materials. The Respondents filed several documents, including an excerpt from the Fiscal Review Report that stated that total appropriations for the 2003-2005 biennium for K-12 education, family and early childhood programs, and state education agencies would be over $11.9 billion, which it characterized as "a net increase in state general fund appropriations of about $1.9 billion over the previous biennium."[8] The Respondents also submitted a copy of a June 4, 2003, memorandum sent by Mr. Cook to the Republican Senators regarding education funding which indicated, in relevant part:

> As a reminder, the education bill that was signed into law is claimed by the DFL to slash school funding. But the claim is in relation to a projected baseline that assumed automatic growth in K-12 appropriations. It is not in relation to what is actually being received in the current school year.
>
> Compared to the current school year (FY 03), the Department of Education is projecting average school revenue to increase in FY 04 and FY 05 (revenue = state aid + local level), which is why

[6] Complaint at 5.
[7] Office of Senate Counsel and Research, "A Fiscal Review of the 2003 Legislative Session," at 76.
[8] *Id.* at 4 (attached to Respondents' submission as Exhibit A).

the Governor has continuously said that his budget protects classrooms.[9]

In addition, the Respondents provided copies of a document entitled "2003 Session Review Talking Points, which indicated with respect to K-12 funding that "[s]ome have portrayed the result as a 2 percent 'cut' of $185 million, but this is in relation to a projected baseline that assumed future funding increases, not in relation to the actual amount being spent in the current school year."[10]

The Complainant indicated that he had no objection to the supplemental exhibits provided by the Respondents, but did not provide any further documentation.

**Legal Standard**

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.[11] The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and the guidance provided by the Minnesota Supreme Court in *State v. Florence.*[12] Probable cause exists if, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.[13] If the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict or acquittal in a civil case, the matter should not be dismissed for lack of probable cause.

**Minn. Stat. § 211B.06 Claim**

Minnesota Statutes § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material that is false and which the person knows is false or communicates to others with reckless disregard of whether it is false. The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.[14]

Based on this standard, the Complainant would have the burden at the evidentiary hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the material knowing that it was false or

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[9] Memorandum from Ed Cook to Republican Senators (June 4, 2003) (attached to Respondents' submission as Exhibit B).
[10] 2003 Session Review Talking Points (attached to Respondents' submission as Exhibit C).
[11] Minn. Stat. § 211B.34, subd. 2.
[12] 239 N.W.2d 892 (Minn. 1976); *see also* Black's Law Dictionary 1219 (7th ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")
[13] *Id.*, 239 N.W.2d at 902.
[14] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent "in fact entertained serious doubts" as to the truth of the material or acted "with a high degree of awareness" of its probable falsity.[15]

To be found to have violated section 211B.06, therefore, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent unfavorable deductions or inferences based on fact, even if misleading.[16]

**Analysis**

House File 51 was an omnibus appropriations bill that included funding for K-12 education for fiscal years 2004 and 2005. The bill, which Mr. Gaither supported in 2003, did not cut K-12 funding in actual spending dollars. In fact, total appropriations for K-12 education and early childhood programs increased by $1.9 billion over the previous biennium.[17] However, this funding was less than the projected budget for K-12 education, which forecasted growth based on certain statutorily required inflationary factors.[18] According to the Fiscal Review Report, the Legislature used a combination of appropriation cuts and shifts that resulted in a net reduction of $622 million in the General Fund to the forecasted education budget for the 2003-2005 biennium. The report indicated that of this $622 million reduction, about $185 million was from actual program cuts.[19]

Minnesota Statutes § 211B.06 is directed against false statements of specific fact.[20] It does not prohibit inferences or implications, even if misleading, extreme or illogical.[21] In addition, statements that "[tell] only one side of the story" or are merely "unfair," without being demonstrably false, have been held not to violate the Fair Campaign Practices Act.[22] Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance,

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[15] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).
[16] *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).
[17] Respondents' Ex. A.
[18] Respondents' Ex. C.
[19] Respondent's Ex. A.
[20] *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).
[21] *Kennedy v. Voss,* 304 N.W.2d at 300 (inferences that may be considered extreme and illogical do not come within the purview of the statute.) *See also, Bundlie*, 276 N.W.2d at 71 (statements that are merely "unfair" or "unjust," without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)
[22] *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979).

inaccuracies of expression or detail are immaterial.[23] Even a highly slanted perspective is not enough by itself to establish that a respondent acted with knowledge that the statement was false or with reckless disregard of whether it was false.[24]

While it is true that House File 51 made reductions in the 2003-2005 education budget forecast that assumed automatic growth in K-12 appropriations, it is equally true that, in actual spending dollars, the bill represented a net increase in appropriations for K-12 education over the previous biennium. The Administrative Law Judge concludes that, while the Respondents' statement clearly reflects a favorable interpretation of the net effect of House File 51 and only tells one side of the story, the claim that Mr. Gaither never voted to cut K-12 funding is not a demonstrably false statement that was made with reckless disregard of its falsity.

After reviewing the record and considering the arguments of the Parties, the Administrative Law Judge concludes that the Complainant has failed to establish probable cause to believe the Respondents violated Minnesota Statutes § 211B.06 when they asserted that Mr. Gaither never voted to cut K-12 funding. Accordingly, this matter must be dismissed.

**B.L.N.**

[23] *Jadwin v. Minneapolis Star and Tribune Co.,* 390 N.W.2d 437, 441 (Minn. App. 1986).
[24] *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003) (quoting *Stokes v. CBS, Inc*. 25 F.Supp.992, 1004 (D. Minn. 1998)).